1978

Industrial Construction Inc. et al v. State of Utah : Brief of Respondent

Utah Supreme Court

John G. Marshall; Tuft & Marshall; Attorney for Respondent;
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IN THE SUPREME COURT OF THE STATE OF UTAH

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INDUSTRIAL CONSTRUCTION, INC., a Nevada Corporation, and PRITCHETT CONSTRUCTION COMPANY, a Joint Venture,

Plaintiffs and Respondents,

vs.

STATE OF UTAH, by and through the DEPARTMENT OF TRANSPORTATION,

Defendant and Appellant.

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BRIEF OF

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APPEAL FROM
FIFTH DISTRICT
THE HONORABLE

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CITATIONS TO STATE OF UTAH STANDARD SPECIFICATIONS FOR ROAD AND BRIDGE CONSTRUCTION 1970 EDITION (EXHIBIT D-2)

IN THE SUPREME COURT OF THE STATE OF UTAH

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INDUSTRIAL CONSTRUCTION, INC., a Nevada Corporation, and PRITCHETT CONSTRUCTION COMPANY, a Joint Venture,

Plaintiffs and Respondents,

vs.

Case No. 15167

STATE OF UTAH, by and through the DEPARTMENT OF TRANSPORTATION,

Defendant and Appellant.

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BRIEF OF APPELLANT

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STATEMENT OF THE KIND OF CASE

This case arises out of the alleged breach of a road construction contract by the Appellant with a claim for damages including anticipated profit under an anticipatory breach of contract theory by Respondent. Appellant alleged that Respondent first breached the contract and is liable to Appellant.

DISPOSITION IN LOWER COURT

The trial court, the Honorable J. Harlan Burns, presiding, determined that the Appellant was guilty of having breached the contract and that said breach was material and anticipatory in nature. The court determined damages, including loss of profit in the total sum of $1,346,754.58 and awarded same on the 25th day of March, 1977.

RELIEF SOUGHT ON APPEAL

Appellant seeks the following relief on appeal:

1. A determination that Respondent first breached the contract and judgment for damages resulting therefrom against Respondent or, in the alternative, an order remanding the case to the trial court for a proceeding to determine the damages due by Respondent; or,

2. For an order determining that the actions of the Joint Venture Respondents subsequent to the alleged breach of the contract by Appellant on September 26, 1975, constituted an election of remedies to proceed with performance of the contract and that the subsequent refusal of Respondents to perform is a breach of the contract by said Respondents; or

3. For an order determining that the damages awarded by the trial court are excessive and should be modified by the deletion of all the alleged anticipated profit, rental of equipment from and after October 24, 1975, deletion of general damages, deletion of the cost of water, salaries to key personnel, restoration of price reduction for paving done after the alleged breach; or

4. For an order modifying the judgment by the allowance of additional offsets for uncompleted contract items; or

5. For an order awarding Appellant a new trial for the reason that the trial court committed substantial errors which cannot be corrected without a new trial.

FACTS

The parties entered into a contract for the construction of a segment of I-15 in Millard County from North Holden to Scipio on the 11th day of September, 1974. (Exh.

P-11)[1] * In the spring of 1975, questions arose concerning aggregate storage for later use in bituminous paving mixes. Appellant's Project Engineer notified Respondent by letter on May 6, 1975 (Exh. D-5) that sheets 56 and 57 of the special provisions of the contract (Ex. which require separate sized aggregate were controlling. spondent replied on May 8, 1975 (Exh. D-6) and cited sh 55 of the provisions. The Appellant's reply on May 12, (Exh. D-7) explains that sheets 56 and 57 of the provisi are not influenced by sheet 55 which pertains to dryer-l mixing. This letter concluded by stating: "You are req to comply with the directions covered by these sheets." 56 and 57.) Subsequently, on May 14, 1975, Respondent s a letter (Exh. D-8) to Appellant's engineer outlining th contractor's objections to the specified method of aggre gate storage and requested the engineer to permit Respon to use an alternate method under the provisions of Secti 108.05, Paragraph 7 of the Standard Specifications, (Ex. which allows for changes under certain conditions. The pellant's engineer responded May 16, 1975 (Exh. D-9) tha he "lacked the authority to change specifications but w forward the request." On May 28, 1975, each of the part

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* This case was bifurcated for trial. The record for ea part of the trial begins with Page 1. To avoid confus references to the record of the first phase of the tri have the number 1 immediately following the page refer a number 2 immediately following the page reference in cates the second phase of the trial in July of 1976.

originated letters to the other concerning the aggregate handling. Appellant's letter (Exh. D-1) stated that it preferred the contractor to follow the specifications and that if they were to be relaxed it would require an appropriate price reduction. The Respondent's letter (Exh. P-2) stated that the Respondent would produce three stockpiles of aggregate of different sizes. Appellant's engineer sent a letter to Respondent on June 4, 1975, (Exh. P-3) approving the proposal contained in Respondent's letter, (Exh. P-2) and stated that the proposal "meets the intent of the specification." * Respondent began the production of bituminous paving material on September 18, 1975. (R. 88)[1] At that time, Respondent had only one aggregate pile located at the plant site. (R. 104)[1] Two piles of aggregate containing coarse and fine aggregate respectively, were located approximately ten miles away at the other end of the project. (R. 105)[1] On September 23, 1975, Appellant's engineer notified Respondent by letter (Exh. P-5) that the location of the three piles was contrary to the Special Provisions and Respondent's proposal. He directed the Respondent to "supply two or more stockpiles at the plant site." Respondent did not provide the piles as directed, and on September 26, 1975, the Respondent was handed a letter dated September 25, 1975, (Exh. P-6) which stated in pertinent part "that the Respondent would not be paid for noncompliance bituminous surface course,"

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* The Special Provision (Exh. D-4, sheets 56 and 57) required that aggregate be stored in separate piles of differing size and that this material be fed from these piles in the mixing process for better control.

allegedly since it did not comply with his letter of May 28, 1975 (Exh. P-2) or the special provision. Respondent thereafter terminated operations. Following a brief peri of discussion (R. 122, 129-131)[1] and exchange of correspon ence, (Exh. P-6 and D-3) the Respondent commenced a lawsui on October 1, 1975. Subsequently, the Respondent, on or about October 31, 1975, completed paving the northbound lane in the vicinity of the Scipio Summit so that traffic could be detoured onto said northbound lane. The other joint venture partner, Pritchett Construction Company, con tinued performance from the 26th day of September 1975 to January, 1976, without interruption. (R. 135)[1] Respondent Industrial Construction, Inc., prior to resuming operation in October of 1975, notified Appellant in writing (Exh. P- that it was returning to work "solely in order to protect the work performed to date." (Finding of Fact No. 24) Appe lant responded by letter, stating that it considered Indus Construction Co. and Pritchett Construction Company bound contract. (P-10) The Respondent, Pritchett Construction C pany, did not at any time inform Appellant in writing that its performance after September 26, 1975, was in any way ditional. It allegedly informed Appellant verbally of this Subsequent to September 26, 1975, the Respondent Industria Construction, Inc., kept equipment and some operators and

supervisors in a standby status pending a resolution of the impasse between the parties. At the conclusion of the work in October, 1975, Respondent Industrial Construction, Inc. suspended operations. No further work was accomplished by Respondent, Industrial Construction Co. thereafter. Pritchett Construction Company worked until January, 1976. The issue of liability was tried to the Court, Judge J. Harlan Burns, beginning March 25, 1976. Subsequently, the Court ruled that a breach of contract had been committed by Appellant. The issue of damages was tried thereafter in July of 1976, and after submission of briefs and further argument, judgment was entered on the 25th day of March, 1977, for the sum of $1,346,754.59. Appellant filed its appeal thereafter.

I

THE TRIAL COURT'S FINDING THAT PLAINTIFF WAS EXCUSED FROM HAVING TO COMPLY WITH THE SPLIT STOCKPILE PROVISION IS ERRONEOUS AND CONTRARY TO LAW AND IGNORES THE FACT THAT PLAINTIFF FIRST BREACHED THE CONTRACT.

The contract between the parties contained a special provision (Exh. D-4, Pages 56 and 57) which in essence required any prospective bidder to separate the gravel aggregate into two or more piles of differing sized composition. The intention of the specification is to guarantee a more positive control of the material going

into the bituminous mixer to in turn get a product of more consistent gradation. (R. 275)[1]

The contract also contained an acceptance provision regarding gradation and bitumen content at the point of placement on the highway grade. This provision further established a method of accepting material at a reduced price when the mix was not fully acceptable but within certain allowable tolerances. (Exh. D-4, pp. 40-

The evidence shows that between September 18, and September 25, 1975, the contractor produced 9,865.9 of "bituminous surface course 3/4" maximum. (Exh. D-12) this sum, 3,250.75 tons were accepted without a price re tion and 6,615.20 tons were accepted with a price reduc

The evidence further shows that at the time th paving began, Respondent had constructed one pile of ag gate at the site of the hot mix plant and had screened t ditional piles of material which contained material eit larger than that which would pass a No. 4 screen (4 ope per square inch) or all of which would pass through a n 4 screen. These piles were located at the other end of job some ten miles away. (R. 65)[1] Respondent asserts th complied with his letter of May 28, 1975 (R. 235)[1] and f asserts that the special provision (Exh. D-4, pp. 56, 57)[1] d specify that the piles must be located at the site of th mix plant.

The evidence at trial essentially was to the effect that with continuous mix asphalt plants the only method of controlling aggregate gradation was in the feeding process. The splitting of the aggregate enables this to be accomplished by adjusting the feeding of aggregate from separate piles. (R. 230)[1]

The Respondent contended among other things that it: (1) had a different type of plant and thus should be excused from the aggregate specification; or (2) that it had received verbal assurance from State representatives that it would not have to comply with that provision.

As to the first point, the evidence shows that the plant is a continuous mix plant with some modifications. (R. 29-30)[1] There did appear to be a capability of removing some of the finest sized material. (R. 29)[1] Notwithstanding this evidence, Appellant submits that a careful reading of the aggregate storage provision (Exh. D-4, pp. 56, 57)[1] and a comparison of the evidence (R. 29-31)[1] shows that the plant in question was not unique enough to be excluded from the type of plant which the specification was written to cover.

As to the second point, the trial Court has ruled that the Respondent "was reasonably led to believe that an adjustment would be made in the provisions of said construction contract so as to eliminate the use of the split stockpile method in Respondent's production of bituminous surface course material." (Conclusion of Law No. 2)

While ordinarily an Appellant cannot properly raise a factual issue on appeal, it is submitted that in this instance the facts should be reviewed carefully, since they demonstrate the fallacy of the Court's conclusion both factually and legally.

The alleged "adjustment" in the split stockpile method results from a conversation between Laliff Wood, Plaintiff's owner and C. V. Anderson, Appellant's assistant director. Wood's version of the conversation (R. 39-41)[1] is that the conversation occurred prior to the submission of a bid on the day of the bid opening. (June 20, 1974) Anderson's version is that it occurred at a later date. (R. 421)[1] Construction commenced in July of 1974, and not until March of 1975 did the dispute concerning aggregate storage surface. (R. 41, 42)[1]

The facts show that in July of 1974 at the time of the preconstruction conference, the "split stockpile provision was discussed. During trial, a transcription of the discussion was placed in evidence. (Exh. D-19) Laliff Wood admitted that the transcript was correct. (R. 219)[1] The significant point is that at no time during this conversation dealing with the provision in issue was anything said about Respondent being exempt from that provision and/or indeed asserting that the conversation with Anderson had in fact occurred, which if it is to be believed, was only a few days previous to the preconstruction conference.

Not only is there a dispute concerning the date of the conversation, but the substance of the alleged conversation is disputed. (Compare R. 39-41 with R. 416-421).[1]

It is, however, Appellant's contention that the Court's conclusion regarding the non-application of the split stockpile provision because of the alleged assurance apparently arising from a conversation prior to bidding is erroneous and contrary to contract law in any event. If the conversation did in fact take place on the day of the bid, then it should be considered as merged in the contract. In the case of National Surety Corp. v. Christiansen Brothers, Inc., 29 Ut.2d 460, 511 P.2d 731, it is stated:

> . . . Where parties engage in negotiations concerning a transaction pursuant to which they enter into a written contract, it is presumed that all matters relating to subject are merged in and constitute a complete integration of their agreement.

The contract does not in fact recite that Respondent could ignore the provisions of sheet 56 (Exh. D-4) or that they did not apply to him as Respondent alleged and the trial Court erroneously found.

The real question, it is asserted, is rather what did Respondent's proposal as contained in the letter of May 28, 1975 (Exh. P-2) obligate Respondent to do and has Respondent breached that obligation?

Appellant submits that everything which occurred prior to May 28, 1975, is moot, including alleged assurances

regarding the nonapplication of sheets 56 and 57 to Respondent, if that letter in fact constitutes a new proposal. Appellant submits that the letter has to be read in the context of correspondence and contractual provisions as well as discussions which either existed or occurred prior thereto to ascertain the intent of the proposal. It is therefore clear that Respondent, having been informed of the requirement to split the aggregate and knowing this was Appellant's interpretation of the contract provision, was making a proposal to comply by constructing "three piles, one plus 4, one minus 4, and one of "natural material." Read in the context of sheets 56 and 57 of the contract special provisions (Exh. D-4), this clearly meets the intent of that provision.

The Respondent asserted and the trial Court erroneously accepted the point that "neither the original specification nor the modification contained any requirement as to where the three stockpiles were to be located." (Finding of Fact No. 4)

Appellant concedes that the language of the specific provision (Exh. D-4, Sheets No. 56 and 57) does not specifically require that the separate sized aggregate be stored on the plant site, nor does Respondent's letter of May 28, 1975 (Exh. P-2) While it is true that the exact language does not exist in either Exhibit, Appellant asserts that anyone of

mon intelligence would obviously assume that a competent contractor would locate the separate sized piles at the plant site. The intent of the specification is obvious from the language. In sheet number 56 (Exh. D-4) it states, "The minus 4 aggregate shall be fed to the drier at a uniform rate. . . ." Since the mix cannot consist of only minus 4 aggregate, it follows that a pile of plus 4 aggregate is required and it is beyond belief that a contractor will locate that at another location and haul it in for every mix. This language certainly implies that the stockpiles will be located at the plant site.

If in writing the letter of May 28, 1975, (Exh. P-2) Respondent knew or intended that Appellant would be misled into believing that it intended compliance with the split stockpile method while intending all along not to comply, then Respondent is guilty of fraud. Appellant's letter of acceptance, dated June 4, 1975, (Exh. P-3) shows that Appellant understood Respondent's letter to mean compliance "with the contract specifications as bid." Respondent's silence thereafter is further evidence of its apparent intent to mislead Appellant into believing Respondent intended compliance.

Certainly, Appellant understood the letter to mean compliance with the specifications of the contract. The Court rejected this in its finding. That is patent error. This Court has recently spoken concerning ambiguous documents in the case of Wells Fargo Bank, N.A. v. Midwest Realty & Finance

Co., 544 P.2d 882 (1975), wherein it is stated:

> . . . In dealing with a document which is ambiguous or uncertain, the general rule is that it should be construed strictly against the party who wrote it (Midwest) and favorably to the party against whom it is invoked (Wells Fargo). Further, when a document is of that character, the trial court can take extraneous evidence and look to the total circumstances to determine what the parties should reasonably be deemed to have understood thereby. These principles are to be considered together with this further proposition that where there was dispute, it is the prerogative of the trial court to determine whose evidence will believe.

How can the correspondence be looked at objectively and the language be misconstrued? It is obvious from Appellant's letter of June 4, 1975, (Exh. P-3) that it believed Respondent intended to comply with the intent of the specifications.

Appellant submits the trial Court has interpreted the specifications and the correspondence related thereto improperly. Appellant requests that this Court review the documents and correct the error of the trial Court.

This Court has recently stated that this procedure action is appropriate in the case of Lake v. Hermes Associates, 552 P.2d 126 (1976) wherein it is stated:

> . . . The defendant places reliance on the standard presumptions of credibility and veracity to be accorded the findings and judgment of the trial court. However, in a case of this nature where the resolution of the controversy depends upon the meaning to be given documents, the trial court is in no more favored position and is in no better able to determine the meaning of such documents than is this court. Therefore, as to such an issue, those presumptions do not apply. [Citing Burns v. Skogstad, 69 Idaho 227, 206 P.2d 765 (1949)]

Operations commenced on September 18, 1975, and continued on September 19 and September 22. On September 23, 1975, Appellant informed Respondent by letter of its non-compliance with its proposal of May 28, 1975. (Exh. P-2) This letter also points out the failure to comply with special provisions covering sections 403 and 407. (Exh. D-4) This letter further directs Respondent to supply "two or more stock-piles at the plant site."

Appellant submits that the foregoing facts and evidence show a clear breach of the contract by Respondent, either of the special provision contained in sheet 56, (Exh. D-4) or assuming that provision of the contract did not apply due to verbal assurances, then of the subsequent proposal of May 28, 1975, (Exh. P-2) submitted by Respondent. In either event, Respondent was clearly in breach of the contract or his own proposal prior to any breach by Appellant arising out of the letter of September 25, 1975. (Exh. P-6)

The case of Lowe v. Rosenloff, 12 Ut.2d 190, 364 P.2d 418, is a case involving suit by an administrator of a deceased subcontractor to recover money allegedly due on a subcontract and damages. The Court states the following rule:

> . . . It is an elementary priciple of the law of contracts that in order to recover upon a contract, the contractor must first establish his own performance or a valid excuse for his failure to perform. (Citing authorities including Am.Jur.) Since plaintiff failed under the uncontradicted proof to complete the work he contracted to do, without valid excuse for such failure, he was entitled to no judgment against defendant.

The same reasoning should apply in this cas
to-wit: that the Respondent contractor in order to cl
a breach of contract must first demonstrate that he h
self has not, in fact, breached the contract.

The facts as cited above that between Septe
18, 1975 and September 26, 1975, the contractor produ
9,865.95 tons of bituminous surface course, and of wh
6,615.20 tons were subject to a price reduction since
did not completely meet the specifications indicate a
lem. While it is true the contract allows for accepta
of material at a reduced price which is close to being
specification, the intent was not to permit a contract
continually produce material not in full compliance. (
D-11 and R. 323)[1] It is designed to assist with paymen
a contractor at a lesser price on those few occasions
the full specifications are not met. (R. 323)[1] Here,
thirds of the product in the first seven days' operati
to meet full compliance. It was thus apparent that a
product could not be consistently produced as early as
fourth production day. The contractor was directed on
tember 23, 1975, to comply with the specification as i
written or with his own alternate proposal of May 28,
(Exh. P-5)

Appellant further submits the following state
from 17 Am.Jur.2d 989, Section 141 on contracts as bein
point:

> . . . It is held that a party who seeks to recover damages from the other party to a contract for a breach must show that he himself is free from fault in respect to performance of a dependent promise or counter promise, or a condition precedent.

As a matter of fact, what we have here is a classic case of "first breach." The general law in this area is well stated in 17 Am.Jur.2d 807, Section 366 under contracts, as follows:

> . . . As a rule, a party first guilty of a substantial or material breach of contract cannot complain if the other party thereafter refuses to perform. He can neither insists on performance by the other party nor maintain an action by the other party for a subsequent failure to perform. At least the party first committing a substantial breach of the contract cannot maintain an action against the other contracting party for a subsequent failure to perform when the promises are dependent. It has also been said that where a contract has not performed, the party who is guilty of the first breach is generally the one upon whom rests all the liability of the nonperformance. (Emphasis supplied.)

Under the rationale of the authorities cited, and in view of the facts which exist in this case, it seems clear that the first breach was the failure of Respondent to comply with the specification or his alternate proposal. Appellant's letter of September 23, 1975, (Exh. P-5) and Respondent's continued refusal to comply with the engineer's direction to provide at least two stockpiles at the hot plant site, (R. 673)[1] constituted a breach of contract. Under the doctrine of first breach, this would make the alleged breach on the part of Ap-

pellant immaterial since Respondent is legally prevente
from enforcing the contract under the authorities citei
his own "first breach."

Conceivably, there could be a question concer
the engineer's authority to so order the location of th
stockpiles as set forth in his letter of September 23,
(Exh. P-5) and prior verbal directions. (R. 673)[1] On th
point the Court's attention is invited to Section 105.0
the Standard Specifications (Exh. D-2), which states in
tinent part as follows:

> . . . The Engineer will decide all questi
> which may arise as to the quality and acceptan
> of materials furnished and work performed and
> the rate or progress of the work; all questio
> which may arise as to the acceptable fulfillm
> of the contract on the part of the contractor.

Quite clearly Appellant's engineer considered
absolute failure of Respondent to follow the provisions
sheets 56 and 57 (Exh. D-4) or his own letter of May 28,
as the cause of the problem which results in a failure
the quality standards of the contract.

Appellant submits that an objective review of
contract documents, the correspondence in evidence whic
cited herein, and the testimony in evidence as well as
tinent legal authorities, demonstrates that the Court's
cannot be legally sustained and, that in fact the Respo
was legally in breach of either the contract or his own
nate proposal prior to September 26, 1975.

II

THE JUDGMENT IS INCONSISTENT AND CONTRARY TO LAW SINCE RESPONDENT WAS GUILTY OF THE FIRST BREACH, OR UNDER THE DOCTRINE OF ELECTION OF REMEDIES THE ACTIONS OF THE JOINT VENTURE PARTNERS AFTER THE ALLEGED BREACH CONSTITUTED AN ELECTION TO CONTINUE PERFORMANCE AND RESPONDENT HAS BREACHED THE REVIVED CONTRACT.

OVERVIEW

Appellant submits that a careful review of the documents in evidence make it abundantly clear that the Respondent Industrial Construction, Inc. first breached the contract and that the subsequent breach of the contract by Appellant, if in fact there was a breach, is the ultimate responsibility of said Respondent.

It is further submitted that the actions of both of the Respondent joint venture partners subsequent to the breach determined by the trial Court constitute an election to proceed with performance of the contract and that Respondent's subsequent refusal to perform after it had returned to work is a breach of the revived contract.

Appellant further submits that the Court's award of amounts over contract prices for work done by Respondent Industrial Construction, Inc. after the date of the Court determined breach is inconsistent and reflects gross error. The trial Court has used a contract formula to calculate damages after ruling that no contract existed. The proper measure

of damages would be the reasonable value of the work, if damages were due.

These three Points will be treated in the following sections:

A. FIRST BREACH

This Point is covered in Section I of this brief and Appellant incorporates that argument here.

B. ELECTION OF REMEDIES

Appellant asserts that Respondent's actions subsequent to the alleged breach on September 26, 1975 under the doctrine this Court announced in the case of Hurwitz v. David K. Richards Company, 20 Ut. 2d 232, 436 P.2d 794 (1968) which outlines three alternatives to one not in breach, as to an election to continue performance. The Court in that said, one who suffers a breach can (1) rescind the contract pursue available remedies; (2) treat the contract as binding and wait until the time for performance and bring action if breach; or (3) sue for damages. This case is in line with general rule of law as set out in 17 A C.J.S. 657 [Contracts Section 472(1)] wherein it is stated:

> . . . The party not in default has alternative remedies open to him, and he may not pursue all of them; specifically, he may not claim damages as for an anticipatory breach and at the same time treat the contract as in force. (Emphasis supplied.)

This is consistent with equitable principles enunciated in the case of Jameson v. Wirtz, 396 P.2d 68 (Arizona), wherein the Court stated:

> " . . . Equity abhors forfeiture and will seize upon slight circumstances to relieve a party therefrom."

This Court has also spoken in this context in the case of Green v. Palfreyman, 109 U. 291, 166 P.2d 215, wherein the Court states the following:

> " . . . Forfeitures are not favored . . . every reasonable presumption should be indulged against intention to allow a forfeiture. . . ."

Applying the foregoing principles to the facts of this case it is obvious that Respondent's actions subsequent to the alleged breach raise a "presumption" against a forfeiture and constitute an election to continue to perform. This is all the more evident in face of the letter from Appellant, dated October 24, 1975, (Exh. P-10) which states in effect that the contract still exists. If Respondent was correct in relying on the letter of September 25, 1975, (Exh. P-6) as constituting a breach, then it had the three potential remedies under the Hurwitz doctrine, supra. Under the Palfreyman rule, supra, every reasonable presumption goes against forfeiture which was one of the remedies. It is thus apparent that any act contrary to forfeiture for whatever alleged spurious reason should constitute an irrevocable election. Respondent's subsequent refusal to perform thus becomes a breach of the "revived contract."

The Court has erred in refusing to allow Appellant to submit evidence regarding the performance of both Respondent Industrial Construction, Inc. and Pritchett Construction Company subsequent to the breach. The Court listened to Respondent's evidence about the nature of the work and its necessity according to said Respondent's theory (R. 171-177)[1] The Appellant, however, was prevented by the Court from showing that it had in fact made plans to handle traffic in an alternate manner and that the work was not as critical as the Respondent asserted. (See Proffer on this point.) (R. 699-702)[1] This evidence would have rebutted the evidence of Respondent that the only reason it performed the work subsequent to the alleged breach was to avoid "potential liability." The fact is, Respondent did nothing concerning the handling of traffic until he was informed that Appellant was planning to use the existing roadway for traffic. This fact motivated Respondent to perform the paving ostensibly to protect itself but as Appellant's evidence would show, this was not in fact true.

C. INCONSISTENT JUDGMENT

Notwithstanding the fact the Court has determined that Appellant anticipatorily breached the contract, it has awarded damages inconsistent with that legal position. The Respondent submitted evidence that it incurred additional

costs of $49,554.18 over the amount payable pursuant to the contract. Appellant submitted no evidence on this point since it considered that performance after an alleged breach is an election of one of the remedies open to a party, and by electing this approach compensation should be governed by the contract. (R. 48-49)[2] In addition, the Court prevented Appellant from submitting evidence. (R. 698-701)[1]

Appellant cites the following cases which sustain its position that work done after a breach is to be paid for at contract prices and binds him to perform. The case of Newark Slip Contracting Co., Inc. v. N.Y. Credit Men's Adjustment Bureau, Inc., 186 F.2d 152 is one such case. This case involved work done by the plaintiff after a failure of defendant to pay which the Court construed as a breach. The plaintiff wanted to recover additional sums. The Court said the following:

> . . . If one party to the contract continues performance after a breach by the other he must continue on the contract terms. [Citing A. 605 (Schlegel v. Bott); 3 Williston on Contracts, Rev. Ed. § 688, 143 A.L.R. 484, 496-503]. The breach does not permit him to make a new contract without the others consent. . . .

In the case of Schepf v. McNamara, 354 Mich. 393, 93 N.W.2d 230, a case involving breach of contract for hauling sand after the haul distance was increased, the Court said:

> . . . By continuing thus to perform and to accept payments under it, as above noted, he lost his right, if any, to terminate the contract and declare it forfeited. (Citing Robinson v. Lake Shore & U.S. Railway Co., 103 Mich. 607, 61 N.W. 1041)

> It was appellant's duty, when it discover the apparent breach of the contract, if it in to insist upon a forfeiture, to do so at once permitting appellees to proceed with the perf of the contract it waived a breach. Grapon Lumber Co. v. Slack-Kress Tie & Stove Co., 79, 143 S.W. 583.
>
> Where there has been a material breach wh does not indicate an intention to repudiate t mainder of the contract, the injured party ha genuine election either of continuing perfor or of ceasing to perform. Any act indicating an intent to continue will operate as a conc election, not indeed of depriving him of a ri of action for the breach which has already ta place, but depriving him of any excuse for ce performance on his own part. . . .

Obviously, the Appellant did not consent to a contract or increase in cost over contract prices" as i from its letter of October 24, 1975. (Exh. P-10)

Appellant submits that Respondent's election t the work after receiving Appellant's letter of October 1975 (Exh. P-10) is an implied acceptance of the contrac that recovery cannot exceed the amount the contract woul If the trial Court is correct that the contract was brea then recovery should be based on a quantum meruit theor on a force account basis which is the way Respondent's t mony was submitted. (R. 48-50)[2] "Force amount" is a co tual remedy for items not otherwise covered by the cont the Court found the contract to be breached.

The Court has also committed error in refusing hold that the performance by the other Respondent and jo

venture partner Pritchett Construction Co. (see Proffer of Proof, R. 134-136)[1] constitutes an election of remedies to continue performance. The same arguments which apply to the performance by Respondent Industrial Construction Co. apply equally to Respondent Pritchett Construction Co. in this context. The proffer by Pritchett was challenged and disputed by the witness Jerry Sherman who explained that plans had been made which obviated the need for the work to be done as alleged by Pritchett. (R. 679-685 and Exh. P-27)[1] Appellant submits that performance by either or both of the joint venture partners following the alleged breach on September 26, 1975, should constitute an election to waive the breach and proceed to perform the contract, Hurwitz, supra, and consistent with that election to continue, recovery is allowed only as the contract provides.

The trial Court has ignored this election, and in fact has "increased the damages" contrary to the rule set out in the case of Rockingham County v. Luten Bridge Co., 35 F.2d 301 (1929) where the Court said the following:

> . . . While a contract is executory, a party has the power to stop performance on the other side by an explicit direction to that effect, subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that stage in the execution of the contract. The party thus forbidden cannot afterwards go on, and thereby increase the damages, and then recover such damages from the other party. . . . (Emphasis supplied.)

The effect of the Court's ruling in this cas in compensating Respondent for work done after the bre in excess of contract prices is directly opposed to th ruling of the Court in Rockingham. It results in an "i crease in the damages," which is inconsistent. The App lant was and is willing to compensate Respondent at co tract prices and so advised Respondent prior to the wor being accomplished.

III

THE AWARD OF ANTICIPATED PROFIT IS EXCESSIVE AND CANNOT BE SUPPORTED IN THE RECORD AND REFLECTS PREJUDICE BY THE COURT.

The trial Court awarded judgment in the amoun of $340,025.18 for anticipated profit on the portion of work remaining to be completed at the time of the Court' determined breach of contract in September of 1975. Th were several memorandums submitted to the trial Court i connection with this issue and it apparently represente a troublesome issue to decide. Appellant's position du trial, in its memorandums and presently was and is, that there was no substantial amount of anticipated profit remaining in the contract at the time of the Court's determined breach in September of 1975. It is respect-

fully submitted that a review of the record supports this contention and quite clearly demonstrates that the Court's figure is erroneous and cannot be supported by Respondent's own evidence.

The Court in Finding of Fact No. 33 has found that there is remaining work to be performed totaling $1,700,125.93 and has arbitrarily found that twenty percent of this amount represents anticipated profit. It is submitted that this cannot be supported legally or factually in the record but is simply an arbitrary, capricious determination by the trial Court and ignores evidence before the Court.

Appellant respectfully urges that this Court examine carefully the pertinent parts of the record which will be referred to hereafter, and which demonstrate the error committed by the trial Court.

Before proceeding to examine the record, this Court should understand that the total dollar sum remaining unpaid is subject to adjustment based on actual measured quantities. The original contract amount is a composite figure based on estimated quantities.

At the time of the alleged breach by Appellant in September 1975, the original contract amount of $6,680,000.00 had been increased by the addition of supplemental agreements totaling $103,603.56 (Exh. D-77) for a beginning balance of

$6,783,603.56. In September of 1975, $3,715,324.00 h
been earned and paid, except for appropriate retenti
amounts as provided by the contract. (Exh. D-67, pg.
An additional sum of $274,000.00 (Exh. D-67, pg. 1) r
presenting unpaid mobilization was also earned but
since the contract provided for release of this amoun
the percentage of completion increased. The Court ac
Respondent's evidence concerning its unarmortized cos
providing water in the amount of $19,513.00. (Exh. P-
Deducting the amounts referred to leaves a balance of
$2,774,766.56. This figure includes work to be accom
by the Respondent Industrial Construction, Inc., by Pri
Construction Co., and by various subcontractors. The
on subcontractors to Respondent is the mathematical di
between the subcontract price to Industrial and Indust
bid price to Appellant. The Pritchett work has profit
which goes to Pritchett, not Respondent.

Appellant submits that the evidence shows th
bined total of subcontract items and work to be done b
Pritchett totals $561.120.00 (Exh. P-41) less an overp
of $68,000.00 to Pritchett on estimate No. 16, or a ne
of $493,120.00. This figure as stated above includes
due Respondent on subcontractor items and that figure
$27,338.31. (Exh. P-41) In any event, the remaining
due for completion of the work and contractor profit i

$2,281,646.56. This remaining figure includes the sum of $1,073,708.32 for the contract item of asphalt. Pursuant to the contract, the contractor was instructed not to include profit in this item but was instructed to include his profit in other items. (Exh. D-4, Sheet 52) Deducting this amount leaves a net figure of $1,277,938.24. Since this figure is based on estimated quantities it would be expected to change based on actual measured quantities but can be assumed to be fairly accurate except where measurements may reveal a figure at variance from the above.

In preparation for trial Appellant surveyed the remaining roadway excavation work and has determined an apparent underrun in excess of 100,000 yards. (Compare cumulative quantity on Exh. D-69, pg. 2 with estimated quantity and testimony of James Cox on pg. 247.)[2] The remaining difference between the original estimate of this item and the actual paid quantity adjusted by the survey is 432,967 cubic yards which at $0.92 is $398,329.64. (See difference between column one and three and five combined on Exh. D-67, line A 0060). The witness Hitchcock (R. 109)[2] stated that they claim no profit exists in this item, but that it can be completed for the contract price. Thus, whether it underruns or not becomes moot, except that the remaining amount set out must be removed from the remaining money in the contract. In other words, if it fails to underrun and the con-

tractor completes the work he gets the full amount, by his own evidence it will cost him that much to do the work. If it does underrun, he won't get the money won't incur the cost either. Therefore, deducting leaves a net figure of $879,608.60.

The evidence further shows three items in the original proposal total which Respondent does not have any profit in them.

Item # 2 Flagging	$36,0
Item # 3 Pilot car	5,0
Item # 4 Obliteration of old road	2,0
TOTAL	$43,0

(Exh. D-67, pg. 1 and pg. 41) The evidence also sh item of granular borrow was replaced with roadway e (R. 407-417)[2] This item, although a part of the ori posal, has been effectively eliminated and thus the for this item should also be deducted since it is n able to assume that it will be utilized when the ar it was designated to be used has been completed by way excavation. The engineer has authority to make changes without approval of the contractor under Sec 104.02 of the Standard Specifications, (Exh. D-2) the item is a "minor item" as defined on page 5 of D-2.

Deduction of these figures which total $6 leave a net figure of $817,949.85.

In the judgment the Court has awarded certain sums which were in dispute or which were measured and determined since the lawsuit was filed. These sums may contain profit in them but should not be paid for twice, and therefore should be deducted. They are as follows:

Price reduction for non-specification bituminous paving restored by Court	$ 1,822.37
Clearing and grubbing	2,000.00
Cost of drilling and shooting	28,427.45
Pipe, rip-rap, top soil, etc. enumerated in paragraph 26(d) of Findings of Fact	124,350.94
Stockpile gravel	10,734.00
TOTAL	$167,344.76

Deduction of this sum leaves a net figure of $650,615.09.

Finally, the Court in Paragraph 28 of the Findings of Fact has determined that the Respondent was overpaid for certain items by reason of measurements which adjust estimated quantities or the cost of finishing items which Respondent has been paid for but which are not fully completed. These items are as follows:

Adjustment to Roadway Excavation	$ 61,501.08
Adjustment to Roadway Excavation for amount paid for as top soil	68,018.82
Stipulated offset for finishing top soil, clean up, etc.	26,301.48
Offset for embankment finishing	11,055.00
TOTAL	$166,876.38

Deducting this sum leaves a net figure of $483,738.71 to cover the cost of completing the job and the profit, if any, due to Respondent.

If the Court could arrive at a proper figure which Appellant does not believe is possible, that figure, not the figure selected by the Court would be one to use as a factor since it would have items in it might contain profit.

The witness Erma Hitchcock testified concerning Respondent's profit in completing various contracts according to their figures. (Exh. P-41) By mathematical extrapolation between the claimed profit and the bid costs can be derived. They are as follows:

Item No.	Item	Amount	Bid	Cost	Profit
45	Untreated base course	140,960.7 tons	$ 1.60	$ .65	$ .95
46	Bit. surface course	167,761.05 tons	3.00	1.59	1.41
47	Plant mix seal	16,000 tons	5.00	1.96	3.04
48	Bit. additive	1280 gal.	5.80	4.05	1.75
49	Bit. material (spread)	120 tons	35.00	5.13	29.87
50	Bit. material MC 70	546.89 tons	10.00	5.13	4.87
51	Deep pen. asphalt	17.0 tons	25.00	13.00	12.00
52	Blotter material	50.0 tons	12.00	9.00	3.00
53	Surface ditches	32,500 ft.	.15	.05	.10
				TOTAL COST PER RESPONDENT	

If this figure is deducted from the net figure above of $483,738.71, the anticipated profit would appear to be $62,963.04, together with the profit in the subcontracted items of $27,338.31 for a total indicated anticipated profit of $90,301.35.

Since Respondent's cost projections would naturally be expected to reflect the most optimistic projections in favor of Respondent, the reality of a profit to Respondent by completing the work becomes even more speculative.

In any event, the Court's use of an arbitrary multiplier of twenty percent profit is absolutely unconscionable. It appears that the Court refused to examine and consider Appellant's evidence, including the exhibit derived by cross-examination of Respondent's witnesses Hitchcock and Wood (Exh. D-77) in sufficient detail. Even a cursory review of this evidence reveals that there simply is not enough money left in the remaining contract to allow recovery of the anticipated profit which Respondent claimed and which the Court allowed.

As to where the Court got its arbitrary multiplier of twenty percent and how it determined the sum to which it applied, Appellant has no idea. During the examination of Mrs. Hitchcock it appeared that the profit margin they were claiming was roughly thirty percent. In cross-examniation, (R. 149)[2] she was questioned on this point since that type of margin is so excessive it obviously had to be challenged. On force account items an add-on factor is added to allow

for overhead and profit. There was some mention of ... in testimony by Bob Rowley. (R. 193)[2] Appellant's ... randums to the Court attempted to dispel the impress... that this is a proper way to compute profit, but the... the Court used a twenty percent multiplier indicates... Court retained this erroneous impression.

Section 109.04 of the Standard Specificatio... (Exh. D-2) governs force amount payment. This sectio... modified by a special provision (Sheet 6, Exh. D-4). ... increased that add-on factor for profit percentage fr... twenty to thirty percent. The fact is, as is eviden... the language of the provisions in questions, that thi... centage is not applied to all factors used to determi... force account price. It is not applied to the equip... which is usually the largest factor in the calculatio... it is not a true multiplier. As the Court knows, a f... count arrangement is only resorted to when a price fo... cannot otherwise be arrived at. It is artificial and ... little relation to reality as far as costs of an over... tract. Appellant submits that if this is the justific... for the Court's adoption of the twenty percent multipl... that the Court has committed obvious error. There is ... reason with the evidence that the Court had in front o... for the Court to adopt such an arbitrary method of det... damages for anticipated profit. The figures in eviden... with a little bit of mathematical calculation, demonst...

the fallacy of Respondent's claims to anticipated profit. (Exh. D-77)

Appellant believes this Court was correct in the case of Monter v. Kratzers Specialty Bready Company, 29 Ut.2d 18, when it said:

> . . . The fact that it is difficult to calculate damages will not prevent an injured party from recovery. However, a judgment cannot be based upon mere speculation.

Here the trial Court has obviously indulged in speculation to determine its award of profit to Respondent without properly analyzing the evidence before it. Appellant has obviously been injured by the Court's actions and is entitled to relief.

IV

THE AWARD OF GENERAL DAMAGES IS NOT SUPPORTED BY THE EVIDENCE, IS EXCESSIVE AND REFLECTS PREJUDICE BY THE COURT.

The trial Court awarded the sum of $100,000.00 as general damages in the judgment. Appellant believes that this amount is aribtrary and obviously excessive. Respondent in its complaint seeks the sum of $100,000.00 and with no substantial evidence to support the award other than the testimony of Mrs. Hitchcock to the effect that they were going to incur damages for counsel fees, etc. in a nonspecific amount, (R. 82-84)[2] the Court proceeded to award the full requested sum.

Appellant is not contesting the right of a Court to award general damages, assuming the fact of breach of contract. It is further conceded that a C must exercise its judgment as to what is reasonable general damages cannot be ascertained with great cer What Appellant is concerned about, however, is the prejudice exhibited by the Court's award of the enti ed amount requested by Respondent. If there were sub evidence in the record to support an award, it perha be understandable. It is submitted that there is no stantial evidence in the record regarding general da (See R. 82-84 for only testimony in record.)[2]

Section 1037, Corbin on Contracts, is entit "Expenses of Litigation." This section deals with ca the only specific items referred to by Mrs. Hitchcock reference to "general damages." This section reads as follows:

> . . . If the plaintiff can show that th defendant's breach of contract has caused li gation involving the plaintiff in the payme of counsel fees, court costs in the amount o the judgment and shows further that such ex penditure is reasonable in amount and could have been avoided by him by reasonable and pr dent effort he can recover damage against th defendant measured by the amount of these ex penditures. . . .

It is submitted that there is no evidence to (1) the amount paid or to be paid for counsel fees, co costs or other expense; (2) that the amount expended

sonable; and finally (3) that the expenditure could not be avoided by due and reasonable diligence. As to counsel fees, the standard was not met and as to the few other items she listed under this category of damages, there was likewise no attempt to specify or justify any amount.

In choosing the remedy which was to assert a breach of contract and to refuse further performance, the law clearly intends that Respondent recover for work accomplished to the date of the breach, reasonable expenses of terminating the contract and in certain instances, anticipated profit. On the other hand, it does not require that the party who caused the breach be "penalized."

One of the other general damage items raised in trial deals with the interruption of Respondent's financing and the alleged harships suffered as a result thereof. (R. 82-84)[2] Apparently, Respondent was heavily committed financially and the delay involved in litigating this matter imposed a hardship on Respondent. Appellant has also suffered as must be obvious. Appellant does not believe that damages of this nature, real or substantial as they may be, are or should be cognizable. They simply are not "foreseeable." The landmark case of Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Rep. (1854) established the rule or concept that damages must be "reasonably foreseeable" and it has been adopted by the Utah Court in the case of Pacific Coast Title Insurance

Co. v. Hartford Accident & Indemnity Co., 7 Ut.2d 377, 325 P.2d 906, wherein the Court stated that damages recoverable are:

> . . . based upon the concept of reasonable foreseeability that loss . . . would result from the breach. . . .

Appellant asserts that how a party finances operations internally and the possible difficulty which may encounter for this reason in a breach of contract outside the realms of a "foreseeable" damage. If he financed his operations without borrowing, then no damage of this nature would result. To require Appellant to pay for Respondent's financing charges adds to the damages is contrary to the Pacific Coast Title Insurance Co. v. Hartford case, supra, as to foreseeability and also contrary to the general law which prohibits the party not in breach from adding to the damages. This point is illustrated by the case of Bomberger v. McKelvey, 35 Cal.2d 607, 729 (1950) where the Court stated the following:

> . . . Either party to an executory contract has the power to stop performance on the contract by giving notice or direction to that effect, subjecting himself to liability for damages, and upon receipt of such notice the other party cannot continue to perform and recover damages based on performance. (Citations omitted.) This is simply a plication of the principle that a plaintiff must mitigate damages so far as he can without loss to himself.
>
> Obviously, a party causing a breach must live with the results of that action. So also must the party who

elects to stand on the breach. He should not recover more than is reasonable and fair to both parties. To compensate him for such things as internal financing costs, alleged expenses such as Court costs and counsel fees, etc., under the guise of "general damages" without requiring the party to make a substantial effort to support them in the record, particularly when some of the elements of the so-called general damages are not legally recoverable, works a "gross injustice." Appellant believes that the Court's award of the entire claimed sum of $100,000.00 as general damages results in a gross injustice to Appellant. Appellant further submits that Respondent has not met the burden of demonstrating the fact of general damages, let alone a reasonable basis for the Court to exercise discretion in awarding any amount and that the entire amount awarded should be eliminated from the judgment.

V

THE EVIDENCE DOES NOT SUPPORT THE COURT'S AWARD FOR VARIOUS OTHER ITEMS IN THE JUDGMENT AND FURTHER THE COURT'S REFUSAL TO ALLOW CERTAIN OFFSETS IS CONTRARY TO THE WEIGHT OF THE EVIDENCE.

A. OTHER ITEMS NOT SUPPORTED BY EVIDENCE

Much of the evidence presented by both parties during the trial dealt with the question of sums due Respondent for work done to the date of breach. Closely tied to

this was the question of offsets due Appellant for w
partially complete on the date of breach.

Appellant, in addition to the Court's awar
anticipated profit and general damages referred to i
Section IV of this brief, believes that the Court has
mitted error in the award of the following sums:

(1)	Cost of Water (Unrecovered drilling cost)	$ 19,4
(2)	Salaries to Key Personnel	39,7
(3)	Restoration of Price Reduction	1,2
(4)	Equipment Rental Paid to Others	191,2
(5)	Bituminous Paving Done After Breach	49,2
	TOTAL	$302,4

(1) COST OF WATER

As to the cost of water, this was allegedly
remaining unamortized out of a total sum of $77,372.0
P-52) incurred by Respondent according to the testimon
Mrs. Hitchcock. (R. 34-39)[2] Appellant asserts that thi
is not a separate pay item under the contract and there
has to be included in an existing contract pay item. T
Court's attention is invited to the item of mobilizatio
(see Exh. D-2, page 269, Section 601.01) which reads in
tinent part as follows:

> Mobilization shall consist of preparator
> work and operations, including, but not limite
> to, those necessary for the movement of perso
> equipment, supplies and incidentals to the pr
> ject site, for the establishment of all office

> buildings and other facilities necessary for work on the project; for furnishing . . . and for all other work and operations which must be performed, or cost incurred, not otherwise paid for prior to beginning work on the various items on the project site. (Emphasis supplied.)

Appellant respectfully submits that to allow Respondent separate payment for this item will result in double payment. It is obvious from the emphasized portion of the language in Section 601.01, supra, that since the providing of water is a prerequisite for most items of roadway work, it must be provided for "prior to beginning work on the various items" and that it is "not otherwise paid for." If Respondent for its own purposes chooses not to charge this item to the mobilization item (unbalanced bid) that, of course, is its prerogative; however, the submission of the bid on the mobilization item pursuant to the specification presumably includes payment for this work and it is improper to accept Respondent's self-serving assertions as the trial Court apparently did that they did not charge the expense to the mobilization item. (R. 37)[2] The witness Wood contradicted his employee, Mrs. Hitchcock, in explaining what the bid item of "mobilization" included and specified "developing water" as one item. (R. 196)[2] This is an open invitation to chicanery, contrary to the contract provision, and in conflict with Respondent's principal officer's testimony.

It is also beyond comprehension that a contractor would incur that kind of expense on the front end of a con-

tract and then pro-rate the cost over work items wh[ich] knows will not be completed until near the end of t[he] tract. (To-wit: untreated base course and paving.) realistically will include it in the mobilization i[tem] knowing that he can recover a substantial portion o[f] expense at an earlier stage. (See Section 601.02 o[n] 269 of Exh. D-2 wherein it is provided that the mobi[lization] item is released in stages as the contract is compl[eted] instance, twenty-five percent completion triggers re[lease] sixty percent of the total mobilization item. See a[lso] Wood's explanation on pages 196 and 197)[2]

(2) SALARIES TO KEY PERSONNEL

(4) EQUIPMENT RENTAL PAID TO OTHERS

(5) BITUMINOUS PAVING DONE AFTER BREACH

As to the salaries of key personnel, equip[ment] rental paid to others and bituminous paving done subs[equent] to the breach, the Appellant cites the case of Blair, [et al.] v. U.S. for Use of Gregory-Hogan, et al., 147 F.2d 9[46] wherein the Court in commenting on damages allowable [for] a breach of a construction contract states the follow[ing] page 848:

> . . . Expenses incurred by a party in p[re]paration for performance of a contract before its abandonment by the other party are proper elements of damages caused by the breach (c[ases] Cowan v. Smith, 149 F. 945) and generally, w[here] breach of a construction contract prevents p[er]formance the damages are (1) what is expended ward the performance, and (2) profits that w[ould] have been realized by full performance. Wh[ite] River Levee Dist. v. McWilliams Dredging Co.,

Cir., 40 F.2d 873. We don't see, in the circumstances disclosed by this record, how charges for rent of the machines can be allowed. The machines belonged to plaintiffs. They were to be used on the project. Their use on the work might have produced a net profit. Whether any profits would have resulted if plaintiffs had fully performed is left to pure speculation which is not sufficient as a basis for damages. U.S. v. Behan, 110 U.S. 338; . . . As said by the Supreme Court in Miller v. Robertson, 26 U.S. 243, 45 S. Ct. 73, 78, 69 L. Ed. 265:

> One who fails to perform his contracts is justly bound to make good all damages that accrue naturally from the breach; and the other party is entitled to be put in as good a position pecuniarily as he would have been by performance of the contract.

He is not, however, entitled to better his condition nor to profit by non-performance. We think there is a logical difference between expenses incurred and an allowance for the rent of machinery not in fact used and there are practical reasons for allowing the one and rejecting the other. . . .

Appellant concedes that a rental expense incurred for machinery owned by others may be recoverable by Respondent. However, the rental agreements in this matter were either "purchase contracts in disguise" or could apparently have been cancelled at will with no penalty. (See Exhibits D-78, D-80, D-81, D-82, and R. 115-121, 488-490.)[2] Appellant asserts therefore that the crucial question becomes the date that damages cease to run against Appellant. When Respondent elected to adopt the remedy of cessation of performance and to stand on the breach and refuse to perform, he incurred the duty of mitigating damages at that point. His failure to act accordingly does not obligate Appellant to respond in damages. Assuming arguendo that a reasonable time follows during which

the parties seek for a way out of the impasse it is c
ceivable that his failure to act should not prevent
If indeed this is correct, then Appellant asserts tha
spondent's letter of October 22, 1975, (Exh. P-9) is
off date of that period since Mr. Wood unequivocally
that "we consider our contract with the State has bee
minated" on that date. If Appellant is correct in thi
pretation of the law, then the amount awarded for equi
rental is at lest three times what would be reasonable
Exh. P-42) The Court awarded damages based on three m
rental.

Likewise, the salaries to key personnel should
terminate at the same cut-off date and are at least th
what they should be. (See Exh. P-49)

The payment of $49,559.18 for paving done afte
breach is in addition to contract amounts paid and has
been commented on in Section II C. Respondent should b
ped from further recovery or the old contract should be
sidered revived by this election of the remedy of proce
with performance. In either event, proper recovery is
tract price, or the reasonable value of the work, not
ditional sum which the Court has awarded for this item
force account.

(3) RESTORATION OF PRICE REDUCTION

Finally, as to the restoration of the price re
of $1,822.37, Appellant finds this to be one of the mos

tasteful acts of the trial Court even though the amount is somewhat insignificant. The problem results from alleged erroneous test information and whether or not the Respondent acted on that information. The unrefuted testimony of Mr. Weldon Heaton is that he "caught his own error, tried to reach Mr. Wood, was unsuccessful, so he drove to the plant and delivered the corrected report and found that the operator had not changed the plant settings. (R. 529)[1] This means no production deficiencies on that day resulted from the erroneous test. The price reduction is therefore proper. He further testified concerning a conversation with Mr. Wood about this test result, in which Mr. Wood admitted that the results were correct, (R. 530)[1] and the price reduction was proper. This was not refuted in the evidence.

B. OFFSETS NOT ALLOWED

Considerable evidence was offered relating to offsets claimed by Appellant. Substantial offsets were allowed by the Court, and certain offsets were stipulated to. Appellant is concerned by the failure of the Court to grant more than $11,055.00 for the cost of finishing embankment. This sum is the amount Respondent testified it would cost to finish subgrade. The Respondent's testimony was based mostly on his opinion. (R. 544-551)[2] Appellant is mindful of the fact that the Court will not reverse the trial Court if there is "substantial competent evidence" in the record to support the trial

Court's ruling. Because of the disparity in the evid
and the apparent disregard of the Appellant's testim
the trial Court, Appellant submits that the trial Co
failed to properly evaluate the testimony and has err
the amount of the damage award.

Appellant submitted the testimony of Bob Rowl
a project engineer on a project similar in scope and
near Beaver and which was being worked at the same ti
the subject project. (See R. 179-216)[2] Mr. Rowley tes
that actual experience with Respondent indicated the c
finishing the subgrade to be $0.29 per square yard. (S
61, R. 206)[2] The same equipment, operators and supervi
applied to both jobs. The witness James Cox testifie
the actual required area of refinishing on the subject
ject was 491,206 square yards. (See R. 230)[2] Respond
made no effort to submit the basis for its figure but
offered the "opinion of Mr. Wood" to support the figur
ferred to. (R. 544-551)[2]

At the time of the alleged breach there had be
1,000,000 plus cubic yards of roadway excavation placed
D-69, Page 2) Some of the grade built with this item
plete and accepted, some was not. Clearly Appellant is
titled to an offset for the required finishing under th
of contract breach. The amount claimed by Appellant am
to ten percent of the total approximately. It is suppo

by competent evidence, both from the testimony of engineers as well as documentary, including a series of photographs. (Exh. D-63, D-64, and D-65) By contrast, Respondent offers the naked opinion of the Respondent's chief officer with no attempt to support this by any calculations, figures or showing as to how their figure is determined. (R. 544-551)[2] This in the opinion of Appellant is not tenable. It does not demonstrate an even-handed approach to the evidence by the trial Court. The contractor should be the best judge of what his costs are, but that does not excuse him from the requirement of submitting "competent evidence" based on recognizable factors or standards to support his "opinion." This he failed to do.

CONCLUSION

Appellant respectfully submits that there is abundant evidence of error in the record. The trial Court formed an impression very early in the proceedings that Appellant had breached the contract and seemed unable thereafter to properly evaluate the evidence during trial. This pre-judgment manifests itself in various erroneous legal rulings by the Court which are obvious and in more subtle fashion by the tendency of the Court to accept Respondent's position over that of Appellant any time there is a conflict in the evidence.

Appellant concedes that the initial reaction of a layman when presented with the facts surrounding the dispute

which leads to this litigation is "why does Appellant
sist on a specified method of aggregate preparation
it would appear that Respondent can achieve at least
tial compliance with acceptance standards by its own
The trial Court obviously could not set aside this
When confronted with the mass of testimony in support
validity of the "method specification" the Court chose
sidestep the obvious conclusion by its finding that
of a verbal assurance prior to submission of its bid
dent was excused from having to comply. Appellant be
this clearly demonstrates how far the trial judge was
pared to go to validate his initial conclusion. The
sue is not what was the pre-bid assurance or even what
contract itself says. The real issue is, did Respond
comply with his own proposal regarding aggregate stora
preparation as set forth in his letter of May 28, 197
proposal was approved by Appellant and it is submitted
evidence clearly establishes that Respondent never did
with his own proposal. The trial Court, contrary to fu
mental legal principles, fails to construe a document
the drafter of the document. It is apparent that Appe
understood the proposal to be that three piles would be
to feed the asphalt plant. It is further apparent that
spondent knew what Appellant's understanding of its pro
was and remained silent. This is either fraud by the R
dent or at the least an ambiguity in construing a docu

which should be construed against the drafter. The Court chose to ignore this point.

Appellant asserts that the overwhelming evidence and conclusion is that Respondent breached the contract first by failing to comply with its May 28, 1975 proposal and later the written directive to comply with this proposal by Appellant's engineer on September 23, 1975.

The subsequent failure of the trial Court to find that the actions of both joint venture partners subsequent to the alleged breach constitute a waiver of the breach or an election to continue performance is further evidence of the trial Court's pre-disposition to find Appellant in a breach. The trial Court ignored the evidence or refused to hear evidence from Appellant on this point.

Finally, in its ruling concerning damages, the trial Court again demonstrates that the Respondent's position is to be accepted over that of Appellant on any disputed point. This is clearly manifest in the small item involving an alleged erroneous test. The Court chose to ignore unrefuted testimony of the lab technician that no change in plant settings occurred and accpeted Respondent's version. The bias of the trial Court is equally manifest in the outright rejection of Appellant's argument based on Respondent's own evidence that anticipated profit could not exceed a figure of approximately $100,000.00 in favor of an arbitrary multiplier of twenty percent of an assumed figure of work remaining.

This multiplier is not based on evidence and is pat
arbitrary, capricious and demonstrates an irrespons
disregard for clear evidence in the record.

In fairness to the trial Court there was a
attempt to be fair in other items of damage such as
ment rental and salaries to key personnel subsequen
date of breach. Appellant submits, however, that
Court could have resolved this problem easily by ap
the law of breach to the effect that once the electi
made to stand on the breach, both parties have to li
the result. One month after the alleged breach occ
Respondent categorically stated there was no contra
ing, and this should be the cut-off date. This mean
award for equipment rental, salaries, etc. is at lea
times what it should have been since the Court chose
month period as the cut-off. The Court's excessive
general damages to the extent of 100% of that claim
substantial testimony to support the award again den
the Court's strong bias against Appellant.

Finally, the Court's total rejection of App
evidence regarding offsets for finishing the subgrad
evidence was well documented and supported in favor
dent's undocumented self-serving "opinion," again de
the bias of the trial Court.

Appellant respectfully submits that the judgment should be reversed and that Appellant should be awarded judgment against Respondent for its breach of the contract or for its subsequent breach of the revived contract. Alternatively, Appellant submits that the judgment should be set aside and the matter remanded to the trial Court for a new trial. Finally, in the event this Court sustains the trial Court in its finding of a breach, the Appellant submits that substantial reductions in the amount of damages are in order as set forth above.

Respectfully submitted,

ROBERT B. HANSEN, Attorney General

By _____
LELAND D. FORD
Assistant Attorney General
Attorney for Appellant

CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Appellant's Brief were mailed, postage prepaid, to John G. Marshall of Tuft and Marshall, Attorney for Respondent, 603 East 4500 South, Suite B, Salt Lake City, Utah 84107, this 3rd day of January, 1978.

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